Supreme Court, U.S.
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No. 99-109

IN THE

SUPREME COURT OF THE UNITED STATES

JOHN F. LONERGAN,
Petitioner

v.

THE UNITED STATES OF AMERICA

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that under 18 U.S.C. § 1546, an advance parole document is a "document prescribed by statute or regulation for entry...into the United States.

2. Whether the Court of Appeals erred in concluding that aliens paroled into the United States have "entered" the United States, as a matter of law.

3. Whether the District Court erroneously refused to dismiss the Entry Document Count and the Entry Count at the conclusion of the prosecution's case (and after trial) on the ground that Parole Documents are not "entry" documents, and the two Iraqi nationals never "entered" the United States, as a matter of law.

4. Whether the District Court unfairly prejudiced petitioner's defense under the Entry Document Count and the Entry Count by erroneously charging the jury that an alien's parole into the United States could constitute an illegal entry.

5. Whether the legal defectiveness of the Entry Document Count precludes conviction under the Conspiracy Count, which charges the Entry Document Count as one of its multiple objects.

6. Whether the District Court unfairly prejudiced Petitioner's defense under the Conspiracy Count by erroneously charging the jury that it should not consider the substantial evidence establishing that his alleged co-conspirator served as a government informant prior to, during and after the alleged conspiracy.

7. Whether the taint and spillover effect of the legally defective Entry Document Count and Entry Count unfairly prejudiced Petitioner's defense of the Bribery Count.

8. Whether the "judicial function" exception to 18 U.S.C. § 1001 precludes conviction under the False Statement Count.

9. Whether the evidence established that one of the two alleged statements under the False Statement Count was literally true.

10. Whether the prosecution constructively amended the False Statement Count by urging the jury to convict Petitioner based on an uncharged statement.

11. Whether the District Court erroneously enhanced Petitioner's offense level under U.S.S.G. § 3C1.1 based on his testimony at trial and his conviction under the False Statement Count.

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PRELIMINARY STATEMENT

Petitioner John F. Lonergan respectfully submits this reply brief in response to the arguments advanced in the Brief in Opposition and in further support of the arguments advanced by Petitioner in his Petition and Brief on Appeal to the Third Circuit regarding (1) the Entry Document Count and Entry Count, (2) the Conspiracy Count, (3) the Bribery Count, (4) the False Statement Count, and (5) the Sentencing Enhancement.

ARGUMENT

1. The Government misleads this Court by misstating that: (1) prior to the parole of the Sattaams, Paul Erdheim determined that the I-512s appeared to be fraudulent and the Sattaams should not be permitted to enter the country; and (2) Petitioner instructed Erdheim to parole the aliens, and based on Petitioner's intervention the aliens were subsequently paroled. First, Paul Erdheim, who testified as a prosecution witness, never testified that prior to paroling the two Iraqi nationals that he had concluded that the I-512s appeared to be fraudulent and that the Sattams should not be permitted to enter the country. To the contrary, Erdheim testified that one of the inspectors presented the I-512s to Erdheim as being counterfeits, but that Erdheim knew that they were not counterfeits, but genuine I-512s. Tr. 192. Moreover, Erdheim testified repeatedly that he did not recall speaking with Petitioner that day and that he (Erdheim) alone decided to parole the two Iraqi nationals into the country. Tr. 200, 203 –208.

2. The Government states that the court of appeals rejected Petitioner's argument that Forms I-512 are not documents "prescribed for entry." See Resp. Br. 4. This statement is also misleading. With respect to Petitioner's conviction under 18 U.S.C. § 1546 (the "Entry Document Count"), it was the court of appeals which erroneously framed the issue to be "whether advance parole documents (INS Forms I-512) qualify as 'documents prescribed for entry into' the United States." See Pet. App. V (emphasis in original). Petitioner has consistently argued to the contrary, that the issue is whether, under Section 1546, Forms I-512 are documents "*prescribed by statute or regulation* for entry into" the United States, and it is this critical distinction

which provides one of the grounds for Petitioner's Petition for a Writ of Certiorari.

3. The Government argues that Petitioner's conviction under 8 U.S.C. § 1324 (the "Entry Count") is mentioned only in passing, and therefore, the Government alleges, it is not clear that Petitioner has adequately preserved his challenge to that conviction. To the contrary, Petitioner has clearly presented challenges to both convictions. Petitioner's arguments that judgments of acquittal should be entered as to both the Entry Document Count and the Entry Count are consistently presented throughout the Petition. See Pet. 11, 14, 23, 26, 29. Notwithstanding the Government's assertion to the contrary, these arguments address both terms "entry" and "enter". Indeed, Petitioner has argued, *inter alia*, that advance parole documents are not "document[s] prescribed by statute or regulation for entry", so as to implicate Section 1546, and similarly, since advance parole documents are not entry documents, the two Iraqi nationals never "entered" the U.S. pursuant to those documents, as a matter of law, so as to implicate Section 1324. Petitioner also argued that statutory law and precedent decisions establish that parole does not effect an "entry", and therefore the parole of the two Iraqi nationals charged in those counts did not constitute an "entry" and, therefore, did not implicate either 18 U.S.C. § 1546 or 8 U.S.C. § 1324(a)(1)(A)(iv), as a matter of law. Significantly, the Government has clearly recognized and understood Petitioner's challenge to his conviction under the Entry Count and the import of his arguments in support of that challenge, and therefore has devoted substantial discussion of the Entry Count in its Brief in Opposition.

The Government's argument that Petitioner has not presented his challenges to his other convictions in the Questions Presented, and therefore Petitioner has waived any such challenges under Sup. Ct. R. 14.1(a), is also without merit. The general rule followed by this Court is that "questions set out *in the petition, or fairly included therein*, will be considered by [this] Court. Sup. Ct. R. 14.1(a). *Holland v. Illinois*, 493 U.S. 474 (1990). Petitioner has clearly and precisely set forth and recited in the Petition each of his challenges to his convictions under the five counts and the sentencing enhancement. Pet. 7-9. Moreover, following Petitioner's recital of those challenges, Petitioner expressly stated

that space limitations precluded Petitioner from addressing his remaining arguments in the Petition, and that he "*does not waive*, but respectfully refers this Court to his arguments on those points in his Brief on Appeal to the Third Circuit." This express language was sufficient to put the Government on notice as to all of Petitioner's challenges in his Petition. Indeed, the Government demonstrates that it has had no difficulty in understanding Petitioner's remaining arguments and the preservation of those challenges, since the Government has addressed those challenges in its Brief in Opposition. See Resp. Br. 6-7. Consequently, there is no doubt that these challenges have been "fairly included" in the Petition. For purposes of ensured clarification, however, Petitioner has included all question presented for review in the Questions Presented in the within Reply Brief.

4. The Government's contention that INS Form I-512 is a document prescribed by statute or regulation for entry into the United States under Section 18 U.S.C. § 1546(a) is without merit. Moreover, it ignores the court of appeals express and unambiguous admission that: "*No statute or regulation indicates whether advance parole documents are entry documents.*" Pet. App. V (emphasis supplied).

In order to overcome this insurmountable obstacle acknowledged by the court of appeals, to wit: that no statute or regulation prescribes that Forms I-512 are entry documents, the Government now seemingly attempts to argue that 8 U.S.C. § 1182(d)(5)(A) and/or 8 C.F.R.§ 212.5 provide the statutory basis for its position that INS Form I-512 is a document prescribed by statute or regulation for entry, within the meaning of Section 1546. In support of that contention, the Government purports to equate parole with an entry, by arguing that parole is an admission – a temporary admission – and thus constitutes an "entry". Both of these contentions are without merit.

First, the Government's contention is contrary to the express provisions of the regulation and statute relied upon by the Government, since neither 8 C.F.R. § 212.5 nor its enabling statute Section 1182(d)(5)(A) ever mention "entry".

Second, controlling *statutory* and *case* law establish that parole does not constitute an "entry" or an "admission". Indeed, Section 1182(d)(5) expressly prescribes that "*parole of [an] alien shall not be regarded as an admission of the alien.*" 8 U.S.C. §

1182(d)(5). (Emphasis supplied.) Additionally, Congress' 1996 amendment of the statutory definition of "entry" as set forth in 8 U.S.C. § 1101(a)(13) expressly equates the term "admission" with "entry", and confirms that parole does not constitute an "entry" or an "admission." Section 1101(a)(13) provides that "the terms 'admission" and 'admitted' mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer" and "an alien who is paroled under section 1182(d)(5)...shall not be considered to have been admitted." 8 U.S.C. § 1101(a)(13) (as amended Sept. 30, 1996) (emphasis supplied). Indeed, under the clear language of the statute, Congress expressly provided that a parolee is deemed not to have been admitted to the United States, and therefore not have made an entry. Furthermore, "cases are legion to the effect that parole does not effect entry." *Siu Fung Luk v. Rosenberg*, 409 F.2d 555, 558 (9th Cir.), *cert. denied*, 89 S. Ct 2151 (1969).

Moreover, Petitioner's challenge to the conviction under the Entry Document Count *is* consistent with the definition of entry prior to its amendment in 1996. At the time of the events at issue, the term "entry" was statutorily defined to include "any coming of an alien from a foreign port or place or from an outlying possession." 8 U.S.C. § 1101(a)(13) (1964). However, the federal courts (including the Third Circuit substantially narrowed that statutory definition by holding that an "entry" requires the "following three elements: 'crossing into the territorial limits of the United States, *i.e.*, physical presence; (2)(a) inspection and admission by an immigration officer, or (b) actual and intentional evasion of inspection at the nearest entry point; and (3) freedom from official restraint.' " *Yang v. Maugans*, 68 F.3d 1540, 1545 (3rd Cir. 1995) (citation omitted) (describing those elements as "well-established law") (Emphasis supplied). Indeed, cases which pre-date the 1996 amendment to Section 1101(a)(13) "are legion to the effect that parole does not effect entry." *See Siu Fung Luk*, 409 F.2d at 558.

The Government also argues that this narrow definition of entry is inapplicable except in cases to restrict the rights of parolees to deportation proceedings. However, this contention ignores the numerous cases which have involved entry-related issues in criminal proceedings, and in which the Courts have uniformly applied, or acknowledged the applicability of the narrow

definition of entry in the context of criminal proceedings. See Pet. 27-30. The Government has failed to address that application.

Moreover, Section 1182(d)(5) is in accord with this narrow definition of entry and its application in the within case. As noted above, Section 1182(d)(5) clearly states that "*parole of [an] alien shall not be regarded as an admission of the alien.*" Additionally, the September 1996 amendment of Section 1101(a)(13) effectively codified the numerous cases "legion to the effect that parole does not effect entry." By equating the term "admission" with the term "entry", and providing that a parolee is deemed not to have been "admitted" to the U.S., and therefore not to have made an "entry", Congress unambiguously embraced overwhelming judicial precedent holding that aliens paroled into the United States have not entered the United States. Furthermore, the cases in which the courts have applied or acknowledged the applicability of the narrow definition of entry in the context of criminal proceedings span several decades. Significantly, Congress has not sought to prescribe the application of the narrow definition of entry to a particular context by drafting legislation to that end.

The Government's other argument that the 1986 amendment to 18 U.S.C. § 1546 broadened the scope of the statute is not disputed by Petitioner, but rather supports Petitioner's arguments. The statutory language of Section 1182(d)(5) and Section 1101(a)(13) establish that Congress is cognizant of, and in accord with, judicial precedent holding that parole is not, and does not effect, an entry. This fact in conjunction with the cases "legion to the effect that parole does not effect entry" and the cases spanning several decades in which the courts have applied or acknowledged the applicability of the narrow definition of entry in the context of criminal proceedings compel a single conclusion, to wit: Congress' decision not to include parole documents in its 1986 amendment of Section 1546 evidences Congress' precise intent to *exclude* parole documents from the statute's proscription.

In support of its argument that INS Form I-512 is "a document prescribed by statute or regulation for entry", the Government also erroneously relies on its examination of a *document*, Form I-512. The Government contends that the language of this document permits an alien "to enter" the United States. However, the Government's reading of the text is misleading since the Government, in the same fashion as the court

of appeals, omitted critical text from the object of their inquiry. The particular I-512 at issue stated, in pertinent part, that "[p]resentation of the original of this document...will authorize an immigration officer at a port of entry in the United States to permit the named bearer whose photograph appears hereon, to enter the United States...as an alien paroled pursuant to section 212(d)(5) of the [I.N.A.]" (Emphasis supplied).

The document does not state that it permits the bearer to enter, nor does the document itself permit the bearer to enter. It states only that it authorizes an immigration officer at a port of entry in the United States to permit the bearer to enter the United States *as an alien paroled*. Consequently, the language appearing on the face of this *document* does not contradict Petitioner's claim that parole is not an entry as a matter of law. To the contrary, it evinces Congressional intent and understanding that parole does not effect nor constitute an "entry" or "admission", in accordance with the *statutory* language of both Section 1182(d)(5) and Section 1101(a)(13) which clearly evidence Congressional intent and determination that parole shall not be regarded an "entry" or an "admission".

The Government also purports to argue that the Forms I-512 at issue enabled the Sattams to remain as residents in the United States. This contention is without merit. Section 1182(d)(5) provides in pertinent part, that "parole of [an] alien shall not be regarded as an admission of the alien and when the purposes of the parole shall...have been served, the alien shall forthwith return or be returned to the custody from which he was paroled." 8 U.S.C. § 1182(d)(5). The clear language of Section 1182(d)(5) expressly provides that parolees are neither (1) admitted into the country nor (2) free from official restraint. Parole is not an "admission" of an alien. Parole does not effect an "entry". Nor does parole afford residence status as a matter of law. Put simply, parole is a *process* under which INS may parole aliens into the United States, on a temporary basis, without admitting them into the country or effecting an entry, and the paroled alien is never free from official restraint. Consequently, Form I-512 is not an entry document, nor does it grant residence status. Moreover, the application for an Advance Parole Document Form I-131 (Rev. 12/10/91) clearly confirms the limited purpose and effect of Form I-512.. The application states: "An advance parole document is

issued *solely to authorize the temporary parole of an individual into the United States*."

5. The Government alleges that even if the prosecution could not establish that Petitioner encouraged or induced the Sattaams to "enter" the United States under Section 1324, the evidence supports Petitioner's conviction on the grounds that Petitioner induced the Sattaams to "come to" or "reside" in the United States. This contention is erroneous for several reasons.

First, the indictment entitles the Entry Count "Inducing Illegal *Entry* of U.S. by Alien" and the prosecution never argued below (to the jury or to the District Court) that a conviction thereunder could be sustained absent a finding that the two Iraqi nationals "entered" the country *via* their paroles. To the contrary, the prosecution argued exclusively that their paroles constituted entries and persuaded the District Court to charge the jury (erroneously) that "[a]n alien's original entry through the use of form I-512, an advance parole agreement, could constitute an invalid original entry." Pet. C.A. Br. 19.

Second, the prosecution has explicitly acknowledged that its case on the Entry Count was based exclusively on the theory that the parole of the Sattaams constituted an "entry." The prosecution clearly states: "[t]he district court concluded that defendant's conduct violated section 1324 because the Sattaams 'entered the United States.' " Gov't C.A. Br. 12.

Third, the Government errs in its contention that the Forms I-512 qualified as proof of residence. As previously discussed, parole does not effect an "entry" nor does it grant residence status, as a matter of law. See pp. 6-7, *supra*.

Fourth, a jury could not have found that Petitioner encouraged or induced the Sattaams to "come to...the United States...in violation of law" or "reside in the United States in violation of law since both the indictment and the jury charge failed to set forth each and every element required for a conviction under those theories.

8 U.S.C. § 1324(a)(1)(A)(iv) imposes criminal penalties on one who "encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law." 8 U.S.C. § 1324(a)(1)(A)(iv) (Emphasis supplied). Consequently, to support a conviction under this

subsection of Section 1324, the government must prove as an essential element that there is or will be *a violation of law* with respect to the *alien's conduct*. However, neither the indictment nor the jury charge set forth this indispensable element. The Indictment stated only that Petitioner:

> "did knowingly and willingly aid and abet and encourage and induce aliens, namely two Iraqi nationals...to come to, enter and reside in the United States, knowing and in reckless disregard of the fact that the said coming to, entry, and residence in the United States by the said Iraqi nationals was in violation of law.
>
> In violation of Title 8, United States Code, Section 1324(a)(1)(A)(iv) and Title 18, United States Code, Section 2." Pet. C.A. Br. 19. (Emphasis supplied.)

The Indictment did not recite any statute or regulation which established a violation or purported violation with respect to the *aliens' conduct*. Similarly, the District Court's charge to the jury under Section 1324 omitted this indispensable element. In pertinent part, the Court charged the jury as follows:

> "The first element of the offense which the Government must prove beyond a reasonable doubt is that the Defendant encourage or induced an alien to come to, enter, or remain in the United States in violation of law. This element is satisfied if you find that the defendant, with the purpose of promoting or facilitating its commission, encouraged or induced an alien to engage in conduct, namely, to come to, enter, or remain in the United States, when such conduct violated the law."[1] (Emphasis supplied).

However, the Jury Charge also failed to recite any statute or regulation which established or purported to establish a violation

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[1] The District Court erroneously substituted the term "remain" for the term "reside" in its charge to the jury under the Entry Count.

(or purported violation) with respect to the aliens' conduct.[2] Consequently, both the Indictment and the Jury Charge were defective with respect to each of the three theories (coming to, entry, and residing), although in finding a conviction under the Entry Count, the jury may have erroneously relied on the District Court's erroneous charge under the Entry Document Count that "an alien's original entry through the use of a Form I-512, an advance parole agreement could constitute an invalid original entry". See Pet. C.A. Br. 19.

The Government also contends that *Griffin* is in inapplicable in the present case to reverse Petitioner's conviction under Section 1324(a) because, the Government alleges, the jury necessarily found all of the facts required to establish that Petitioner induced the Sattaams to "come to" the United States. This argument is clearly erroneous. As indicated above, in order to convict under the first theory of Section 1324 ("coming to"), the jury must find all the facts required to establish that Petitioner encouraged or induced the Sattaams to come to the United States, knowing or in reckless disregard of the fact that such coming was in *violation of law*. However, the Government did not argue that the Sattaams had "come to" the United States, nor that the Sattaams had "come to" the United States in *violation of law*. The Government never presented to the court or jury any legal theory or any statute or regulation which established a violation or purported violation with respect to the Sattaams' conduct. Consequently, the jury could not have found that the Sattaams had "come to" the United States *in violation of law*, or that Petitioner encouraged or induced the Sattaams to "come to" the United States, knowing or in reckless disregard of the fact that such "coming to" by the Sattaams is or will be *in violation of law*. Furthermore, the Government's discussion of *Griffin* in the context of the *Entry Count* (Section 1324) has no bearing on Petitioner argument with respect to the *Conspiracy Count*, to wit: that "the Conspiracy Count should be remanded for a new trial because the legal defectiveness of the *Entry Document Count* ...undermines the

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[2] Similarly, the prosecution never recited or presented to the court or the jury any legal authority, statute or regulation which established or purported to establish a violation with respect to an alien's "coming to" or "residing" in the U.S.

Conspiracy Count, which charges the Entry Document Count as one of its multiple objects." Pet. 7. (Emphasis supplied.)

The Government also argues that even if the prosecution was limited to proving that Petitioner encouraged the Sattaams to "enter" the United States, Petitioner's conviction under 1324(a) is nonetheless valid. The Government reasons that in the context of Petitioner's 1546(a) conviction, the Sattaams sought to "enter" the United States and the Petitioner aided and abetted their effort to do so. This argument is without merit, however, since Forms I-512 are not entry documents, and therefore the Sattaams did not enter, and could not have entered, the United States, as a matter of law.

The Government contends that the *Kavazanjian* decision is of no continuing importance because it pre-dates the 1986 amendment to Section 1324. However, that amendment had no effect on the First Circuit's construction of that statute because neither the term "enter" construed by the court nor the terms "to come to" or "to reside" added by the amendment includes paroles. The Government then insists that other pre-amendment cases "criticized" *Kavazanjian*, and then relies exclusively on two cases which upheld convictions under Section 1324 – *United States v. Hanna*, 639 F.2d 194 (5th Cir. 1981) and *United States v. Pierre*, 688 F.2d 724 (11th Cir. 1982). Notably, the court of appeals also relied on *Hanna* in support of its proposition that parole documents are proscribed by Section 1546. However, as Petitioner has previously established in his Petition, both cases are readily distinguishable from *Kavazanjian* and the within case, because *Hanna* and *Pierre* involved aliens who were paroled into the United States *after* they had made an illegal entry. (See Pet. 23-25 for an extensive discussion of these cases.)

CONCLUSION

The Petition for writ of certiorari should be granted. Respectfully submitted.

NOVEMBER 1999.